WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
NOVEMBER 2014

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Brown
Dane
Clark
Waukesha
Winnebago

WEDNESDAY, NOVEMBER 5, 2014

9:45 a.m. - 13AP500 Melissa Anderson v. Thomas Aul, et al.
10:45 a.m. - 13AP298-CR State v. Richard H. Harrison
1:30 p.m. - 13AP1108-CR State v. Jesse J. Delebreau

WEDNESDAY, NOVEMBER 12, 2014

9:45 a.m. - 09AP3073-CR State v. Michael R. Griep
10:45 a.m. - 12AP818-D Office of Lawyer Regulation v. James E. Hammis

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Media interested in providing camera coverage, must make requests 72 hours in advance by calling media coordinator Rick Blum at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
WEDNESDAY, NOVEMBER 5, 2014
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed a Waukesha County Circuit Court decision, Judge Lee S. Dreyfus Jr., presiding.

2013AP500 Anderson v. Aul

This case examines two questions arising from a dispute over legal malpractice insurance coverage: whether Wis. Stat. §§ 631.81(1) and 632.26(2) require "occurrence" coverage; and whether requiring an insurer to provide coverage for a claim that is not within the scope of the policy's insuring agreement prejudices the insurer.

A decision by the Supreme Court is expected to have a substantial statewide effect on the cost and availability of legal malpractice coverage in Wisconsin.

Some background: Historically, legal malpractice insurance has been available in two flavors: "occurrence" policies and "claims-made" policies. Occurrence policies grant coverage for liability arising from accidents, acts, errors or omissions that occur during the policy's policy period without regard to when the claim may ultimately be made or reported to the insurer.

By contrast, "claims-made" policies provide coverage for claims first made during the policy period, and a further condition is that the claim be reported during the policy period. Under claims-made policies, a claim made or reported after the policy period is not covered, and the insurer need not show any prejudice in having received notice after the expiration of the policy.

Up through the mid-to-late 1970s, most legal malpractice policies were written on an "occurrence" basis. Insurers willing to write the coverage were scarce and those willing to write that coverage would only do so for premiums many Wisconsin lawyers could not afford. This adversely affected the interests of Wisconsin lawyers and their clients and was the impetus for a State Bar initiative that led to the creation of Wisconsin Lawyers Mutual Insurance Company (WILMIC) in 1986. The increasing number of claims and soaring defense costs spurred this change towards "claims-made" policies.

In this case, Atty. Thomas E. Aul ("Aul") represented Melissa and Kenneth Anderson ("the Andersons") in their acquisition of business property from a limited liability company owned by Aul. The Andersons allege Aul did not deal with them fairly and breached his duties to them as their lawyer. The Andersons retained other counsel who sent Aul a letter on Dec. 23, 2009, accusing Aul of wrongful conduct and demanding that Aul pay the Andersons $117,125. Aul retained legal counsel to respond to the Andersons' claim.

WILMIC insured Aul against liability for legal malpractice for the policy period of April 1, 2009 to April 1, 2010. The policy granted coverage for "claims first made against you [Aul] and first reported to us [WILMIC] during the policy period."

It is undisputed that the Dec. 23, 2009 letter put Aul on notice of a claim, and the policy required that letter to be reported to WILMIC within the policy period, which was April 1, 2009 to April 1, 2010. WILMIC did not learn of the Andersons' claim until March 9, 2011, when Aul first reported the claim to WILMIC.

On March 2, 2012, the Andersons sued Aul and limited liability companies owned by Aul. WILMIC undertook Aul's tender of defense under a reservation of rights and intervened in the suit asserting that it did not provide coverage for the Andersons' claims.

The circuit court granted WILMIC's motion for summary judgment, holding that Aul had "ample opportunity" to provide WILMIC with notice of the Andersons' claim within the policy's policy period. The circuit court held that therefore no coverage existed and did not reach the question of prejudice to WILMIC. Judgment dismissing the claims against WILMIC was entered on Jan. 14, 2013.

The Andersons appealed and the Court of Appeals reversed, holding that Wis. Stat. §§ 631.81(1) and 632.26(2) required that WILMIC provide Aul with coverage because WILMIC was not prejudiced by the lack of notice. The Court of Appeals implied that WILMIC made too "much of the fact that the policy at issue is a claims-made policy," stating that §§ 631.81 and 632.26 apply to all liability policies and do "not distinguish claims-made policies."

WILMIC argues that requiring the claims-made-and-reported insurer to provide coverage the policy does not promise prejudices the insurer. It would require the insurer to cover claims the insurer never agreed to cover and for which the insurer did not receive a premium. WILMIC adds that lawyers are educated consumers and compliance with the notice element of claims-made-and-reported coverage is not arduous.

The Court of Appeals found that prejudice under §§ 631.81(1) and 632.26(2) is limited to: "a serious impairment of the insurer's ability to investigate, evaluate, or settle a claim, determine coverage, or present an effective defense, resulting from the unexcused failure of the insured to provide timely notice."

A decision by the Supreme Court could clarify terms of coverage for legal malpractice under certain circumstances and policy types.

WISCONSIN SUPREME COURT
WEDNESDAY, NOVEMBER 5, 2014
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Clark County Circuit Court decision, Jon M. Counsell, presiding.

2013AP298-CR State v. Harrison

This case examines issues related to judicial substitution arising from the conviction of defendant Richard Harrison for burglary, theft, and resisting an officer.

Some background: A criminal complaint filed on July 16, 2010 charged the defendant with burglary, resisting/obstructing, and criminal damage to property, all as a repeat offender. The state filed an amended information on July 11, 2011, adding a charge of misdemeanor theft, as a repeater.

On Aug. 20, 2011, the defendant filed a motion for substitution of judge pursuant to § 971.20(2). The chief judge of the district reassigned the case from Judge Jon M. Counsell to Judge Thomas T. Flugaur.

A preliminary examination was held before Flugaur on Dec. 29, 2010. After the preliminary examination, for reasons not disclosed in the record, Counsell presided over the remainder of the case, including the jury trial that was held in July of 2011, and sentencing. The jury found the defendant guilty of three of the four counts. The defendant was sentenced to 13 years of initial confinement and seven years of extended supervision.

The defendant filed a post-conviction motion arguing he was entitled to a new trial because the judge that presided over his trial had no authority to act due to a timely request for substitution of judge. The motion also alleged that trial counsel was ineffective in multiple respects. In the alternative, the defendant requested sentence modification to allow him eligibility for the earned release and challenge incarceration programs. Along with his motion, the defendant wrote a letter asking that a different judge be assigned to address the post-conviction motion. The circuit court denied the request for a different judge as untimely.

The circuit court amended the judgment of conviction to reflect that the defendant was eligible for the earned release and challenge incarceration programs. The court said, "[a]s the court has granted defendant's requested alternate relief, the court concludes that there is no longer a need for 'a new trial or an evidentiary hearing' to address other issues defendant has raised, as they are rendered moot." The defendant appealed, and the Court of Appeals summarily reversed and remanded for a new trial because Harrison's request for a substitution of judge was not honored.

The state raises three issues:

1. Whether a judge, lacking competence due to a timely motion for substitution under Wis. Stat. § 971.20, presiding over a jury trial and entering the judgment of conviction constitutes "structural error" requiring automatic reversal
2. Assuming the harmless error analysis applies in this case, the judge, lacking competence due to a timely motion for substitution under Wis. Stat. § 971.20, presiding over a jury trial and entering the judgment of conviction was harmless error

3. Whether the defendant's objection to competency of the judge in this case due to a timely motion for substitution under Wis. Stat. § 971.20 was waived when he failed to timely object to the judge's lack of competence

Harrison says this is a fact-specific case with unique circumstances in which he contends that Counsell repeatedly chose not to abide by the substitution statute. Harrison argues that the type of error that occurred here is not prevalent and that the state's claim that a harmless error analysis must be employed to avoid "sandbagging" by defendants and their attorneys is a red herring since it is extremely rare that a judge will return to a case after a substitution request is granted.

WISCONSIN SUPREME COURT
WEDNESDAY, NOVEMBER 5, 2014
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a Brown County Circuit Court decision, Thomas J. Walsh, presiding.

2013AP1108-CR State v. Delebreau

This case examines whether a Miranda [Miranda v. Arizona, 384 U.S. 436 (1966)] waiver is sufficient to waive a defendant's Sixth Amendment right to counsel after a defendant has been charged and is represented by counsel.

Jesse J. Delebreau stands convicted of one charge of party to the crime of delivering less than three grams of heroin, second and subsequent offense, as a repeater.

On March 31, 2011, police took Delebreau into custody in the Brown County Jail on a probation hold. Delebreau was the subject of an ongoing drug investigation. A sheriff's deputy, Roman Aronstein, was involved in the drug investigation. Aronstein had referred charges against Delebreau to the district attorney's office.

Sometime between April 7 and April 9, 2011, Delebreau submitted a request to the Brown County Jail staff requesting to speak to someone from the Brown County Drug Task Force. Jail staff forwarded the request to the drug task force, and the request was reviewed by Aronstein.

On April 14, 2011, the state charged Delebreau pursuant to Aronstein's referral. That same day, Delebreau appeared in court represented by a public defender.

On April 15, 2011, Aronstein responded to Delebreau's request to speak with someone from the drug task force. Aronstein met with Delebreau in the jail. Delebreau received Miranda warnings, waived his rights, and gave a recorded statement.

On April 18, 2011, Aronstein returned to the jail with a written statement for Delebreau to sign. Delebreau again waived his Miranda rights, and he reviewed and signed the statement.

Delebreau later moved to suppress his statements. The motion was denied, and Delebreau was convicted following a trial at which the state utilized the statements.

Delebreau appealed, unsuccessfully. He argued that the state violated his Sixth Amendment right to counsel because, he claimed, a mere Miranda waiver is insufficient to waive the right after a defendant has been charged and is represented by counsel. Delebreau argued that under these circumstances, the state must engage in the more expansive waiver inquiry that is required when a defendant waives his right to counsel in court.

The Court of Appeals disagreed, holding that under State v. Forbush, 2011 WI 25, 332 Wis. 2d 620, 796 N.W.2d 741, Delebreau waived his Sixth Amendment right to counsel when he waived his Miranda rights, and thus the trial court properly admitted his statements at trial.

Delebreau presents two issues to the Supreme Court:

- Once trial counsel has been appointed for a criminal defendant, if the defendant requests a custodial interview with law enforcement, is it a violation of that defendant's Sixth Amendment right to counsel for law enforcement to take a statement from the defendant, without the

defendant's appointed attorney being present, if the officer provides the usual Miranda warnings before taking the statement?

- Once trial counsel has been appointed for a criminal defendant, if the defendant requests a custodial interview with law enforcement, is it a violation of that defendant's Article I, Section 7 of the Wisconsin Constitution right to counsel for law enforcement to take a statement from the defendant, without the defendant's appointed attorney being present, if the officer provides the usual Miranda warnings before taking the statement?

A decision by the Supreme Court could clarify the meaning of the court's divided Forbush decision.

WISCONSIN SUPREME COURT
WEDNESDAY, NOVEMBER 12, 2014
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Winnebago County Circuit Court decision, Thomas J. Gritton, presiding.

2009AP3073-CR State v. Griep

This drunken driving case examines whether the Confrontation Clause prohibits a surrogate witness – in this case a crime lab section chief who did not personally conduct or observe lab work – from testifying regarding a non-testifying lab analyst's procedures and conclusions.

Some background: This is the second time this case has reached the Supreme Court. The Court initially held a certification from the District II Court of Appeals in abeyance, pending the Wisconsin Supreme Court's decision in State v. Deadwiller, 2013 WI 75, 350 Wis. 2d 138, 834 N.W.2d 362. After deciding Deadwiller, the Supreme Court voted 5-2 to deny certification, and the Court of Appeals affirmed, resulting in defendant Michael R. Griep's appeal to the Supreme Court.

Griep was stopped for speeding in August of 2007. The officer who stopped him smelled alcohol. After administering a preliminary breath test, the officer arrested Griep for drunken driving. Griep was taken to a hospital so a blood sample could be drawn. After observing a phlebotomist draw the blood and put it into closed vials, the officer packaged the vials and completed the necessary paperwork to send it out for testing.

At the bench trial in July of 2009, the phlebotomist who drew the blood testified under oath about the procedures she had followed. Also testifying was the section chief for the state crime lab that tested the blood sample. The section chief did not personally conduct or observe the tests of the blood sample but he testified in place of the analyst who did conduct the test. The analyst was unavailable at the time of trial.

Griep objected to portions of the section chief's testimony, arguing that an expert who did not conduct the analysis is not allowed to vouch for the competency and honesty of another witness.

The state countered that an expert testifying in reliance on data produced by another person does not violate the confrontation clause, even if the expert's opinion is based in part on the work of another. The circuit court overruled the defendant's objection, concluding that although an expert cannot act as a mere conduit for another's opinion, he can rely on things that the other person would normally use to render an opinion, such as a report of another expert's testing.

The defendant appealed, and (following this court's refusal of the certification) the Court of Appeals affirmed. In considering the case, the Court of Appeals termed the current state of the law "muddled" and said there was an arguable conflict between binding state court opinions and subsequent U.S. Supreme Court decisions.

The Court of Appeals noted that under the rationale of State v. Williams, 2002 WI 58, 253 Wis. 2d 99, 644 N.W.2d 919, a defendant's confrontation right is not violated when the

surrogate, rather than the analyst who performed the tests, testifies in part based on the crime lab report containing the lab test results concerning the nature of a tested substance.

The Court of Appeals said the Williams rule was announced before the U.S. Supreme Court decided Crawford v. Washington, 541 U.S. 36 (2004), which established a new test under which the reliability of a hearsay statement is not enough to justify its admission at trial; instead, if a statement is "testimonial" hearsay, it is inadmissible unless the declarant is unavailable to testify and the defendant had a prior opportunity to cross-examine him or her.

Griep's petition for review also was held pending the U. S. Supreme Court's decisions on three certification petitions that raised substantially similar issues. The U.S. Supreme Court denied review in all three of those cases.

A decision by the Supreme Court could clarify law in this area and provide direction for similar cases statewide.

WISCONSIN SUPREME COURT
WEDNESDAY, NOVEMBER 12, 2014
10:45 a.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee - a court-appointed attorney or reserve judge - hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case is from Stoughton.

2012AP818-D OLR v. James E. Hammis

In this case, Atty. James E. Hammis has appealed the referee's recommendation that his license to practice law in Wisconsin be suspended for 120 days as the result of nine counts of professional misconduct.

Hammis has been licensed to practice law in Wisconsin since 1988. In 2011 the Supreme Court suspended his law license for four months based on a finding that he had engaged in 10 counts of misconduct, had practiced law while administratively suspended, and had failed to cooperate with the OLR's investigation.

In 2005, Hammis was convicted in the Court of Common Pleas, Tuscarawas County, Ohio, of the crime of reckless endangering, a first-degree misdemeanor under Ohio law. The Ohio criminal matter arose when Hammis was the president, operator, and sole member of ST&E Fabrication, Inc. (ST&E). ST&E was charged in a separate companion criminal case in which Hammis pleaded guilty on behalf of the company to two felony counts of illegal transportation of hazardous waste and illegal disposal of hazardous waste. Hammis failed to report his conviction to the OLR or to the clerk of this court as required by Supreme Court rules. Hammis was required to pay all court costs in the Ohio criminal matter. Ohio court records indicate he had not paid the costs, which totaled $232.16, as of September 12, 2010.

In May of 2010 Hammis was contacted by I.B., who had been found guilty of two counts of homicide by intoxicated use of a vehicle and one count of causing injury while operating under the influence. I.B. was sentenced to six years in prison and seven and a half years of extended supervision for each of the homicide counts, plus an additional year in prison on the causing injury conviction. I.B. asked Hammis to pursue a motion for sentence modification. Hammis sent I.B. a letter enclosing a contract for legal services. I.B. signed the contract and returned it to Hammis. The contract required a $2,000 advanced fee. The contract expressly contemplated that at least a portion of the required advanced fee would be paid by I.B.'s mother. The contract also provided that at the conclusion of the representation, a refund of any unearned advanced fee would be made to I.B. In June of 2010, I.B. paid Hammis $995 from his prison inmate account, and his mother paid another $400 toward the advanced fee.

In August of 2010 I.B. wrote to Hammis saying he was unable to pay the $2,000 advanced fee and that he wanted a refund of the monies previously paid. He also asked Hammis to return the sentencing transcript and pre-sentence investigation report previously furnished to Hammis. Hammis failed to respond to I.B.'s letter and failed to return the materials in a timely fashion.

I.B.'s mother passed away on Sept. 14, 2010. Hammis paid $400 from his business account toward L.B.'s funeral expenses.

The OLR filed a complaint against Hammis on April 18, 2012. The complaint alleged that by engaging in conduct leading to his misdemeanor conviction in Ohio, he committed a criminal act that reflects adversely on his honesty, trustworthiness or fitness as a lawyer in other respects. The complaint also alleged that Hammis's failure to timely notify OLR and the clerk of the Wisconsin Supreme Court of his Ohio conviction and his failure to pay the court costs ordered in the Ohio case violated Supreme Court rules. The OLR's complaint also alleged six counts of misconduct with respect to Hammis's representation of I.B.

The referee found that the OLR met its burden of proof as to all nine counts of misconduct. The referee recommended that Hammis's license be suspended for 120 days, that he make restitution of $995 to I.B. and that he pay the full costs of the proceeding. The referee said he was troubled by the fact that Hammis had previously been suspended for 10 counts of misconduct and by the fact that Hammis had failed to provide any credible evidence to challenge the OLR's charges. Hammis has appealed, arguing that many of the referee's findings of fact are clearly erroneous and that a 120 day suspension is excessive.

The Supreme Court is expected to decide whether Hammis engaged in misconduct and, if so, the appropriate sanction.